

IN THE MATTER OF BABY THOMAS FREEMANTLE
Determination by Coroner
Section 16 of the *Coroners Act 2008*

1. The death of Thomas Freemantle (referred to in this determination as Baby Thomas), was reported to the Coroners Court as a reportable death by Dr Peter Wearne, Consultant Paediatrician, Bendigo Health on 1 November 2010 (by correspondence).¹
2. Baby Thomas was born at his parent's farm in Bendigo on 19 October 2010 in the presence of his father, a family friend and Ms Claire Hall, who Baby Thomas' mother became acquainted with over the internet. Baby Thomas' parents are Garry and Katrina Freemantle.
3. It was reported that on 22 October 2010 at 2.30am, two day old Baby Thomas died at the Royal Children's Hospital in intensive care with cause of death recorded on the death certificate as severe Hypoxic Ischaemia Encephalopathy.
4. Following the death of a reportable death, section 67 of the *Coroners Act 2008* (hereinafter referred to as the Act) requires a coroner to investigate the death and determine, if possible, the identity of the deceased, the cause of death (the medical cause of death) and the circumstances in which the death occurred, in some cases.
5. In addition, a coroner should consider whether the death raises any issues in relation to public health and safety and whether there are any learnings which could contribute to the reduction of preventable deaths in Victoria.
6. It is the practice of the Court upon receipt of a report of death to verify (investigate) whether the death is in fact a reportable death within the meaning of section 4 of the Act [section 14(1) of the Act²].

¹ The Court's Initial Investigation Office initially failed to accept the report of death, but this fact has no bearing on my determination.

² *A coroner may investigate a death that is or may be a reportable death if the death appears to have occurred within 100 years before the death was reported to a coroner.*

7. I was satisfied on the basis of the report of death by Dr Wearne (outlined below) and the fact of an unexpected death of a new born baby, that the death was a reportable death in accordance with the Act:

There is no doubt whatsoever that this child breathed spontaneously after birth even though his breathing was highly abnormal and best described as agonal gasping. He also had a very audible heart beat, faint pulsation and unequivocal evidence of cardiac activity on an ECG. This child must be classified as having died in the neonatal period and there's no justification whatsoever for any claim that he was stillborn.

8. Following a period of investigation into the reportable death of Baby Thomas, I determined that this matter should proceed to inquest and listed it to commence at the Bendigo Coroners Court on 13 May 2013.
9. Interested parties represented at the inquest were Bendigo Health³, Dr Chris Sasse⁴ and Ms Claire Hall⁵. Baby Thomas' parents were also present.
10. At the commencement of the inquest counsel for Ms Hall submitted, in summary and as it appeared to me at that time, that there was no jurisdiction to investigate the death of Baby Thomas as he was a still-born child and, in the alternative, the *extended period of time* following the resuscitation of Baby Thomas was *problematic* suggesting a *legal creation of life after death*.
11. I determined that it was appropriate to adjourn the inquest and invited parties to make written submission on the application made on behalf of Ms Hall by 24 May 2013.
12. Applications were subsequently received from counsel for Ms Hall⁶, Bendigo Health⁷ and Baby Thomas' parents⁸.
13. I note that Bendigo Health did not contend for a position either way on the substance of the submission but did outline evidence currently before me in relation to signs or indicia of life.

³ Ms Currie appeared

⁴ Mr Winneke appeared

⁵ Ms James appeared

⁶ Dated 23 May 2013 and prepared by Ms James

⁷ Dated 24 May 2013 and prepared by Ms Currie.

⁸ Dated 31 May 2013

14. I further note that Baby Thomas' parents submitted that their son '*never lived*' (although they did not expand on this point) but ultimately contended that they 'wholeheartedly' supported the continuation of the inquest.
15. I propose to treat the application made on behalf of Ms Hall as an application for a determination under 16 of the Act that a reported death (that of Baby Thomas) is not a reportable death. That section provides:

(1) A coroner may determine that a death that was reported to the coroner as a reportable death is not a reportable death.

16. The central question to the application, in the first instance, is whether the 'death' of Baby Thomas is a reportable death within the meaning of section 4 of the Act and therefore whether I have jurisdiction to investigate the 'death'. This will depend on whether the 'death of a person' has occurred.
17. Victorian coroners have consistently taken the view that the coronial system does not have jurisdiction to investigate a still-birth because there is no death to investigate. This is because the death of the fetus occurs *in utero*, thus precluding it from being born as a living person.
18. The Act now clarifies that a still-birth is not considered a death and therefore not within a coroner's jurisdiction to investigate. The Act provides by way of a legislative **note** under the definition of death:

A still-birth, within the meaning of the *Births, Deaths and Marriages Registration Act 1996*, is not a death.⁹

19. I note that section 36(3A) of the *Interpretation of Legislation Act 1984* provides:

An example (being an example at the foot of a provision under the heading "Example" or "Examples"), diagram or note (being a note at the foot of a provision and not a marginal note, footnote or endnote) in an Act or subordinate instrument forms part of the Act or subordinate instrument if—

- (a) the Act is passed, or the subordinate instrument is made, on or after 1 January 2001; [my emphasis]

⁹ Note 1: section 3: definition of 'death'.

20. It is not clear why Ms Hall's submission refers to section 36(3) of *Interpretation of Legislation Act 1984* as that section appears to be irrelevant to the notes referred to in that submission.
21. The *Births, Deaths and Marriages Registration Act 1996* includes the following definitions:
- still-birth* means the birth of a still-born child
- still-born child* means a child of at least 20 weeks' gestation or, if it cannot be reliably established whether the period of gestation is more or less than 20 weeks, with a body mass of at least 400 grams at birth, that exhibits **no sign of respiration or heartbeat, or other sign of life**, after birth [my emphasis];
22. Ms Hall's application referred me to the case of *Barrett v Coroner's Court of South Australia*¹⁰ which involved a home birth in which the baby became trapped in the birth canal. The infant had been born without any visible or aural signs of life, but had registered pulseless electrical activity (PEA) of 15 beats per minute on an electrocardiograph.
23. Similar to Victoria, for a South Australian (SA) coroner to have jurisdiction, there must have been a "reportable death" within the meaning of the equivalent legislation and this depended (as with Victoria) upon whether the "death of a person" had occurred. In contrast however the SA legislation does not specifically exclude still-births. The common law "born alive" rule was used to determine whether the infant had achieved legal personhood and was therefore a person whose death was within the jurisdiction of the Coroners Court. The Coroner decided in that case that the Court had jurisdiction and the midwife present at the birth lodged an appeal in the SA Court of Appeal. In considering the application, the Court held that the coroner's jurisdiction *should not be construed narrowly, given the public interest served by coronial inquests and the purposes of the jurisdiction*.
24. The SA Court referred to the NSW Court of Criminal Appeal decision in *R v Iby* (2005) 63 NSWLR 278¹¹, in which Spigelman CJ held that "any sign of life

¹⁰ [2010] SASFC 70

¹¹ Also referred to in Ms Hall's application

after birth (complete separation from the mother) is sufficient¹² to satisfy the born alive rule. In that case, the court held there is no single indicator of life which must be present before it can be said that an infant was born alive.

25. The SA Court considered whether PEA constituted a sign of life, given that the infant in this case did not display any of the recognised signs of life such as heartbeat, pulse, breathing, moving or crying. Taking into account expert medical evidence regarding PEA, the court held that PEA was sufficient to satisfy the born alive rule. In reaching this conclusion, the court noted it was an important factor that a newborn baby who was in PEA by reason of hypoxia (deprivation of oxygen supply) might be revived. Having held that the Deputy Coroner was correct in finding the baby was born alive and therefore he had jurisdiction to inquire into the death, the SA court dismissed the application for judicial review.
26. Ms Hall's submission also referred to the additional legislative note under the definition of death: *Section 41 of the Human Tissue Act 1982 for definition of death for the purposes of the law of Victoria.*¹³ I concur with the comments in *Barrett* referring to a similar provision and its relevance to the present case: *[T]his Act defines when a person, ie. a person who has previously had life, is to be taken to have died. There seems little logic in applying a law specifically when a person is to be regarded as being dead, which presupposes that the person was once alive, to determine whether an infant did once have life.*¹⁴

Did Baby Thomas exhibit any sign of life, after birth?

27. In order for me to find that the death of Baby Thomas was a reportable death I must consider whether there is evidence that he exhibited any sign of life after his birth whether that be *respiration or heartbeat or any other sign*.
28. There appears to be an abundance of evidence that Baby Thomas exhibited signs of life, although I only need to find sufficient evidence of one. I note the following matters (some of which are highlighted in the Bendigo Health submission at paragraph 2):

¹² Paragraph 65.

¹³ For the purposes of the law of Victoria, a person has died when there has occurred—
(a)irreversible cessation of circulation of blood in the body of the person; or
(b)irreversible cessation of all function of the brain of the person.

¹⁴ Paragraph 52.

- Cardiac rhythm changed from asystole PEA with a rate of 90-110, and that Baby Thomas' skin colour had improved;¹⁵
 - The Resuscitation Chart on the hospital records contain handwritten notes that at 2100 hours, an axilla pulse was palpable and Baby Thomas took one self breath, and at 2115 hours he was observed to be centrally pink and taking occasional spontaneous breaths;
 - On arrival to SCBU Baby Thomas presented with a temperature of 33 degrees Celsius and a heart rate of 120bpm as recorded in the nursing notes; and
 - The letter of Dr Wearne which reported the death (as noted above).
29. It is also worthy to note that no health professional was prepared to declare Baby Thomas' life extinct¹⁶ until 2 days after his *birth*.

The affect of delayed resuscitation


30. In the alternative Ms Hall suggests that if there is a delay in resuscitation of an infant, in the manner of '*being brought back to life*', this '*raises a legal and philosophical conundrum: when a child is, for all practical purposes, 'dead' by reason of lack of any signs of life for up to 50 minutes can be said to be 'brought back to life' if 'signs of life' are later artificially achieved by technology.*'
31. This submission does not fully articulate what the affect of this *conundrum* may be in the context of this case. It also presupposes that Baby Thomas exhibited no sign of life for the first 50 minutes of his life.
32. In any event, whether any signs of life are exhibited after birth is a question of fact in each case and there is no time limitation for this to occur. I again note my comment at paragraph 27.
33. As an aside, I note the following quote in *Iby* extracted from a case in another jurisdiction:

¹⁵ Ambulance Victoria

¹⁶ A *life* must be declared *extinct* by an appropriate qualified health professional before a certificate of cause of death is completed.

Many premature babies survive into normal life after a period of assisted breathing and it would be nonsensical to suggest that while breathing in this assisted form the child is not alive.¹⁷

34. Based on all the evidence before me, I have determined that Baby Thomas was a person whose death is reportable under the Act.
35. I have considered the matters in relation to the application for costs and do not propose to make a costs order.
36. An application has also been made to excuse Ms Hall as a witness. I do not propose to rule on this application as there is insufficient detail in the present submission to support the application. I will defer ruling on this matter until I have received further submissions to support the application.



JOHN OLLE
CORONER
18 June 2013

¹⁷ Paragraph 50